
(1986) 10 BOM CK 0027

In the Bombay High Court

Case No : Civil Revision Application No. 723 of 1985

Shaikh Ibrahim Janmohammad

APPELLANT

Vs

Tekchand Alias Ravindra Fakirchand Rathod

RESPONDENT

Date of Decision : 23-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3A(3)

Citation : (1988) 2 BomCR 436 : (1987) 89 BOMLR 39 : (1986) MhLj 902

Hon'ble Judges : A.D. Tated, J

Bench : Single Bench

Advocate : Vijay G. Peshawe, for the Appellant; S.V. Tile, for the Respondent

Final Decision : Allowed

Judgement

A.D. Tated, J.—This Civil revision application was heard and was allowed by me on September, 1, 1986. While deciding this Civil revision it was not noticed that this High Court by Notification No. P. 0102/77 in suppression of the High Court notification No. P. 6324/60 dated September 30, 1966, August 4, 1972, August 1, 1974, P. 0124/63 dated February 17, 1972, P. 0113/68 dated November 21, 1972, P. 0601/55 dated May 20, 1976, P. 0102/77 dated September 28, 1979, and P. 3604/74 dated June 23, 1980, in exercise of the power conferred u/s 122 of the Civil Procedure Code, 1908, was pleased to make amendments to Schedule 1 of the Civil Procedure Code, 1908 and those amendments came into force with effect from October 1, 1983. Code Procedure Code, 1908, was extensively amended by the Central Government by Act No. 104 of 1976 and Rule 3-A was inserted in Order 41 of the Code. This High Court while amending the CPC in 1983 by notification No. 0102/77 dropped R. 3-A which was inserted by High Court Notification No. P. 6324/60 dated September 30, 1966. Therefore, now after amendment of the CPC by this High Court in 1983 there is no amendment to R.3-A which was inserted in the principal Act by Act No. 104 of 1976. Therefore, R. 3-A which was inserted by Bombay High Court Notification No. P. 6324/60 dated September 30, 1966 cannot be taken into consideration

after the amendment of the CPC by this Court by this Notification No. P. 0102/77 which come into force with effect from October 1, 1983. As the matter was earlier decided on the basis of deleted clause 3-A as amended by this Court without noticing that the said amendment by this High Court was deleted while amending the CPC in 1983, it has become necessary to review the earlier decisions.

2. Sub-clause (3) of Rule 3-A of Order 41 of the Code as inserted by Act No. 104 of 1976 reads as follows :

"Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."

In view of the amended provisions of Order 41 of the CPC an application for condonation of delay in filing an appeal has to be decided before admitting the appeal and issuing notice to the Court below under R. 13 of O. 41 of the Civil Procedure Code. Sub-clause (3) of R. 3-A of O. 41 reproduced above provides that an order for stay of execution of decree shall not be made as long as the Court does not after hearing under R. 11 decide to hear the appeal. The CPC has to be interpreted so as to advance the cause of justice. In case a decree is allowed to be executed before deciding the application for condonation of delay and also before hearing under R. 11 C.P.C., the judgment-debtor would be put to a great loss and inconvenience in case later on the Court condones the delay and also admits the appeal on hearing under R. 11. This Rule was considered by the Gujarat High Court in *Naran Annappa Shethi v. Jayantilal Chunilal Shah*, 1986 Guj. L.R.206 and after exhaustive discussion held that the rule was not mandatory and despite the word "shall" the provision made in sub-cl. (3) of R. 3-A was only directory. I fully agree with the reasoning given in that judgment and on the same reasoning I find that the rule is not mandatory. Therefore, if in the interest of justice the Court thinks necessary to stay the execution for the decree pending hearing of the application for condonation of delay, it can certainly stay the execution pending hearing and decision of the application for condonation of delay and admission of appeal.

3. Thus, the earlier decision recorded by this Court is reviewed and for the reasons recorded above, the revision application is allowed. The order of the trial Court dated November 7, 1985 vacating ad interim stay granted by it on October 9, 1985 is set aside and the execution of the decree is stayed till the decision of the application for condonation of the delay. Further hearing of the matter shall be expedited. There shall be no order as to costs of this revision application.